

BRB No. 95-0507

WAYNE A. ARABIE	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
C.P.S. STAFF LEASING	)	
	)	
and	)	
	)	
EMPLOYER'S CASUALTY INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
TOTAL MARINE SERVICES,	)	
INCORPORATED	)	
	)	
and	)	
	)	
AETNA CASUALTY AND SURETY	)	DATE ISSUED: _____
COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION AND ORDER

Appeal of the Order of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Thomas W. Thorne, Jr. (Lemle & Kelleher), New Orleans, Louisiana, for C.P.S. Staff Leasing and Employer's Casualty Insurance Company.

V. William Farrington, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for Total Marine Services and Aetna Casualty and Surety Company.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Total Marine Services, borrowing employer, and its insurer, Aetna Casualty and Surety Company, appeal the Order (93-LHC-143) of Administrative Law Judge James W. Kerr, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This is the second time that this case has been before this Board. The facts of this case are not in dispute. C.P.S. Staff Leasing (CPS), a labor contractor, furnished claimant, a welder, to Total Marine Services (Total Marine) to perform work at its marine repair facility. Claimant was working under the direction and control of Total Marine when he injured his neck on August 23, 1990. Claimant brought suit under the Act against CPS for his work-related injuries, and Employer's Casualty Insurance Company, CPS's insurer, paid him medical expenses and compensation benefits. CPS, in turn, asserted a reimbursement claim against Total Marine on the basis that Total Marine was claimant's borrowing employer and therefore was liable for all or some proportionate share of the claim. Total Marine filed a Motion for Summary Judgment before the Office of Administrative Law Judges, in which it conceded that it was claimant's borrowing employer, but sought dismissal on the grounds that application of Section 4(a) of the Act, 33 U.S.C. §904(a) (1988), precluded its liability for the claim.<sup>1</sup> On February 26, 1993, the administrative law judge issued an Order Dismissing Total Marine Services, and on March 31, 1993, the administrative law judge entered his Order of Final Judgment, denying the claim against Total Marine. Following issuance of the aforementioned orders, claimant and CPS, the lending employer, entered into a 33 U.S.C. §908(i)(1988) settlement of the claim for \$31,703.62, which was approved by the administrative law judge on May 19, 1993.

CPS appealed the administrative law judge's Order Dismissing Total Marine, arguing that as

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<sup>1</sup>Section 4(a) states as follows:

Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

33 U.S.C. §904(a)(1988).

Total Marine was claimant's borrowing employer it was liable for his benefits. Total Marine responded that as it was a general contractor, the administrative law judge properly determined that it could not be held liable for claimant's benefits under Section 4(a) inasmuch as CPS and its insurer are not insolvent. The Director responded, urging that the order of dismissal be reversed.

After hearing oral argument in this case in New Orleans, Louisiana on January 13, 1994, the Board reversed the administrative law judge's Order Dismissing Total Marine and Order of Final Judgement and remanded for consideration of all remaining issues. *Arabie v. C.P.S. Staff Leasing*, 28 BRBS 66 (1994). The Board held that Total Marine was liable for any compensation or medical benefits owed to claimant as a matter of law in light of its undisputed status as claimant's borrowing employer. The Board found that as this case arose within the appellate jurisdiction of the United States Court of Appeals for the Fifth Circuit, it was controlled by *West v. Kerr-McGee Corp.*, 765 F.2d 526 (5th Cir. 1985), wherein the court held that Section 4(a) as amended in 1984 has no bearing on the borrowed employee doctrine and therefore does not foreclose the possibility that a general contractor may be an employer under the borrowed servant doctrine. *See also Perron v. Bell Maintenance & Fabricators, Inc.*, 970 F.2d 1409, *reh'g denied*, 976 F.2d 732 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1264 (1993); *Melancon v. Amoco Production Co.*, 834 F.2d 1238 (5th Cir. 1988). Using the criteria set forth in *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969), and *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977), the Board further determined that Total Marine's stipulation that it was claimant's borrowing employer was consistent with applicable law.<sup>2</sup> Although the administrative law judge found that Total Marine's status as the borrowing employer was irrelevant to the liability issue based on his application of Section 4(a), the Board noted that this determination was directly contrary to *West*.

On remand to the administrative law judge for resolution of the remaining issues, Total Marine and claimant entered into a Section 8(i) settlement which was approved by the administrative law judge on September 24, 1994. Pursuant to the settlement, claimant agreed to accept \$15,000 together with \$3,500 in additional attorney's fees and expenses in settlement of the claim. Total Marine reserved its rights against the lending employer and its carrier. The only remaining issue pending before the administrative law judge was the award of indemnity owed by Total Marine to CPS for benefits it had previously paid.

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<sup>2</sup>In so deciding, the Board noted that Total Marine was responsible for claimant's working conditions, the work was performed in its shipyard, claimant reported to a person at Total Marine for work, and Total Marine's employees told claimant where to weld. In addition, all equipment was supplied by Total Marine, with the exception of claimant's personal welding equipment, and although Total Marine could not discharge claimant from the employment of CPS, it was free to discharge him from its employ. By the nature of claimant's agreement with CPS, CPS served as a temporary employment agency, and claimant agreed to do work for its clients. Although claimant was paid by CPS, Total Marine paid CPS for claimant's services. Finally, there was a meeting of the minds between the two employers in that Total Marine would request welders from CPS, who would supply welders who would then work under Total Marine's exclusive control. The Board further noted that at the time of his injury claimant had been working for Total Marine for about 17 days, a not insignificant period of time.

Consistent with the Board's determination that Total Marine was liable for claimant's benefits, on October 13, 1994, the administrative law judge issued an Order which required Total Marine's carrier to fully reimburse the lending employer's carrier for all sums paid in the total amount of \$69,976.25.<sup>3</sup> Total Marine appeals this Order, asserting that the lending employer is liable for this claim and that it may not be held secondarily liable on the facts presented under Section 4(a) of the Act because it is undisputed that the subcontractor is solvent. CPS replies, urging affirmance.<sup>4</sup>

We reject Total Marine's assertions. The Board fully considered and rejected Total Marine's liability arguments in rendering its initial decision in this case. Our prior determination that Total Marine is liable as the borrowing employer is the law of the case. *See Wayland v. Moore Dry Dock*, 25 BRBS 43 (1991); *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991).<sup>5</sup> We therefore decline to reconsider this issue.

Accordingly, the Order of the administrative law judge ordering Total Marine to fully reimburse CPS is affirmed.

SO ORDERED.

ROY P. SMITH

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<sup>3</sup>The amount of \$69,976.25 was determined as follows:

Temporary Total Disability benefits paid under the State Compensation Act at \$219.82 per week from August 23, 1990 to October 3, 1991	\$12,749.56
Medical Benefits during the aforementioned period	\$25,523.07
Section 8(i) settlement	
Compensation and Medical Benefits	25,000.00
Extra Medical (disputed wrist injury)	1,703.62
Claimant's Attorney's Fee and Costs	<u>5,000.00</u>
	\$69,976.25

<sup>4</sup>On March 31, 1995, the Board granted Total Marine's Motion for Expedited Review of this case.

<sup>5</sup>The rule of "law of the case" is a discretionary rule of practice based upon sound policy that when a case is on its second appeal, an appellate body will adhere to its original decision, unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates that the initial decision was erroneous, or the first decision was clearly erroneous and allowing it to stand would result in manifest injustice. *See Jones v. U.S. Steel Corp.*, 25 BRBS 355, 359 (1992).

Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge